

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN RICHARD AKERS,

Defendant-Appellant.

UNPUBLISHED
September 4, 2003

No. 239924
Calhoun Circuit Court
LC Nos. 93-003146-FH;
93-003147-FH

Before: Markey, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Defendant appeals as of right his sentences for probation violation that were imposed by the trial court in separate but consolidated cases. We affirm in each case.

In 1993, defendant was charged in separate cases with delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv). He agreed to plead nolo contendere in return for dismissal of other charges and a recommendation that he be sentenced to lifetime probation. The trial court sentenced defendant to lifetime probation in each case. In January 1994, defendant was sentenced to ten years in federal prison for conspiracy to distribute marijuana. He was paroled in July 1998.¹ In April 1999, defendant was charged with violating his lifetime probation by delivering cocaine to an undercover officer. The trial court found defendant guilty of violating his probation. In August 1999, the trial court sentenced defendant to consecutive terms of three to twenty years in prison, with credit for five days.

In *People v Akers*, unpublished opinion per curiam of the Court of Appeals, issued March 16, 2001 (Docket No. 221845), another panel of this Court affirmed defendant's convictions for probation violation but remanded the matter for resentencing. The *Akers* Court observed that defendant's sentences were required by MCL 333.7401(3) to be consecutive to each other, and were also required to be consecutive to his federal term of imprisonment. *People v Lee*, 233 Mich App 403, 406; 592 NW2d 779 (1999); *People v Hughes*, 217 Mich App 242, 245; 550 NW2d 871 (1996). The *Akers* Court noted that the trial court failed to address the issue of

¹ At the time of the probation violation proceedings in these cases defendant had been recommitted to federal prison and was serving a sentence of thirty-seven months for parole violation.

whether the state sentences would run consecutively to the federal sentence, and remanded for consideration of that issue. *Akers*, slip op at 2.

In resentencing defendant the trial court acknowledged that he had taken steps to improve himself, but concluded that the circumstances of the underlying offenses and the events that led to defendant's convictions of probation violation were of greater significance. The trial court sentenced defendant to two terms of three to twenty years in prison, with credit for thirty-six days. The sentences were to be consecutive to each other and to defendant's federal sentence.

Defendant argues that when considered together and in light of his federal sentence his minimum terms are disproportionate to his circumstances. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). We disagree and affirm defendant's sentences. In determining proportionality, this Court is not required to consider the cumulative length of consecutive sentences. Rather, the proper inquiry is whether each sentence is proportionate. *People v Miles*, 454 Mich 90, 95; 559 NW2d 299 (1997). The judicial sentencing guidelines do not apply to probation violators and are not to be considered when fashioning a sentence for probation violation. *People v Williams*, 223 Mich App 409, 412-413; 566 NW2d 649 (1997). Defendant's assertion that the statutory sentencing guidelines should be considered to determine the proportionality of his sentences is without merit. The statutory sentencing guidelines apply only to offenses committed on or after January 1, 1999. MCL 769.34(1). The Legislature did not intend that the statutory sentencing guidelines be applied retroactively to offenses committed before January 1, 1999. *People v Reynolds*, 240 Mich App 250, 253-254; 611 NW2d 316 (2000). The key test of the proportionality of a sentence is whether it reflects the seriousness of the matter. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995). Defendant received lifetime probation for his convictions of delivery of less than fifty grams of cocaine when he could have been sentenced to prison on each conviction. He violated both his federal parole and his lifetime probation. His behavior indicated an unwillingness to conform his actions to the requirements of the law. In imposing sentence, the trial court considered defendant's behavior and accomplishments in prison as well as his criminal history and his failure to reform his behavior. The trial court's statement of its reasons for imposing the sentences that it did was adequate. Defendant's minimum terms of imprisonment do not constitute an abuse of discretion under the circumstances.

When probation is revoked and a defendant is sentenced for the underlying offense, it is as though the sentence of probation was never imposed. *People v Burks*, 220 Mich App 253, 258; 559 NW2d 357 (1996). Defendant's assertion that in light of the amendment of MCL 333.7401(3)² he is entitled to have the trial court reconsider the requirement that his sentences be

² 2002 PA 665, effective December 26, 2002, amended MCL 333.7401(3) to eliminate the requirement that a term of imprisonment imposed under MCL 333.7401(2)(a) be imposed to run consecutively with any other term of imprisonment. MCL 333.7401(3) now provides that a term of imprisonment imposed under MCL 333.7401(2)(a) "may" be imposed to run consecutively to another term of imprisonment.

served consecutively is without merit. This case involves the imposition of sentences following convictions of probation violation; therefore, the version of the statute in effect at the time of the original sentencing is the relevant version for purposes of this appeal. *Id.*

Affirmed.

/s/ Jane E. Markey

/s/ Mark J. Cavanagh

/s/ Henry William Saad